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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EDWIN DEJESUS, individually and on behalf of all others similarly situated, CAROLYN PENZO, RICHARD C. LARKIN, WILLIAM M. COOKE, and RANDY J. LANE,

Petitioners,

—v.—

SEARS, ROEBUCK & CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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44 pp

Questions Presented

1. Whether Section 1 of the Sherman Act (15 U.S.C. § 1) is violated when a corporation requires its independent-contractor agents to advertise solely through an advertising agency in which it has a financial interest.

2. Whether Section 1 of the Sherman Act (15 U.S.C. § 1) is violated when a corporation requires its independent-contractor agents to access a database essential to their business solely through computers leased from it by them.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Second Circuit, officially reported at 87 F.3d 65, is set forth in the Appendix annexed hereto at A1a. The opinion of the Southern District of New York, not officially reported, is set forth in the Appendix annexed hereto at A16a.

Jurisdiction

The Second Circuit entered its judgment on June 25, 1996. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

Statute Involved

The pertinent provisions of the Sherman Act, 15 U.S.C. § 1, read as follows:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.

Statement of Facts

A. The Allegations of the Complaint

In April of 1993, petitioners brought an action in the United States District Court for the Southern District of New York against Sears, Roebuck & Co., Inc. ("Sears") alleging, *inter alia*, violations of the Sherman and Clayton Anti-Trust Acts, 15 U.S.C. §§ 1 and 13 through 15.[1] Their third amended complaint ("TAC")—around which this petition revolves—was brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure[2] and made the allegations which follow.

Petitioners are Neighborhood Office Agents ("NOAs") of Allstate Insurance Company ("Allstate"), a corporation

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[1] Since their rights under the Sherman Act are at least as great as those under the Clayton Act, the petitioners have abandoned their claim under the latter and bring to this Court solely their claim under the former.

[2] Petitioners alleged (TAC ¶3[a]) that the class consisted of approximately 10,000 similarly-situated persons. The complaint was dismissed before a motion for class certification could be made.

wholly owned by Sears (TAC ¶¶ 2, 4). In about 1984, at Sears' instigation, Allstate instituted a program to induce its numerous employee-agents to enter into an entirely different relationship with it. Whereas Allstate agents had, in the past, been mere employees, working out of offices owned or leased by Allstate and having their business expenses paid by Allstate, the NOAs would be more like independent contractors, paying their own business expenses such as office rent, utilities, liability insurance, equipment costs, secretarial help, the salaries of other personnel and the like. Some 10,000 Allstate employee-agents became NOAs.

A material inducement to becoming a NOA was the right to advertise individually in the local Yellow Pages—a right which, as mere employees, the agents did not previously possess. Those who became NOAs, however, were required to arrange such advertising exclusively through an agency controlled by Sears, the income of which (estimated to be many millions of dollars) belonged, in whole or in part, to Sears.

Additionally, through Allstate, Sears required each NOA to lease a Sears-provided computer in order to access the Allstate database, such access being essential to the NOAs proper performance of their duties. Other computers equally capable of accessing that database were available on the open market, for lease or purchase, at a substantially lesser cost, but the NOAs were forbidden to lease or purchase such computers from sources other than Sear's. Nor was a NOA permitted to share a fellow-NOA's computer even if he or she shared the same office. While the practice continued, Sears obtained approximately $20,000,000 per year from the NOAs in rental charges.

Petitioners alleged (TAC ¶¶ 27, 32) that in allowing the NOAs to advertise in the Yellow Pages *solely* through a Sears-owned entity, and by requiring the NOAs to obtain access to the necessary database *solely* through the lease of a Sears-owned computer, Sears violated the Sherman Act.

Sears moved to dismiss these anti-trust claims pursuant to Rule 12(b) on the ground that the complaint failed to allege a claim upon which relief could be granted.

B. The District Court's Ruling

The District Court (Mukasey, J.) dismissed both the Yellow Pages count and the computer count on the ground that each count "fails to allege an unlawful tying arrangement" (A19a).

With respect to the Yellow Pages issue, the court held that "the tying product appears to be employment as a NOA" and "employment alone" is not a tying product (A20a).

With respect to the computer issue, the court held that "the database is the tying product," that "a basic requirement of an illegal tying arrangement is that the defendant actually sell both the tying and tied product" and that "because there is no claim that plaintiffs were required to pay for the Allstate database, their allegation of an illegal tying arrangement must fail" (A21a).

Petitioners appealed the dismissal to the Second Circuit.[3]

C. The Second Circuit's Ruling

The Second Circuit affirmed the dismissal of the antitrust claims. With respect to the Yellow Pages issue, the Court held, as did the court below, that "employment, standing alone, cannot constitute a tying product within the meaning of the antitrust laws" and that therefore "this tying claim fails at the threshold" (A13a). With respect to the computer issue, the Court held that neither access to the database nor the database itself could be deemed a tying product since it is "not generally available to persons willing to pay for it," but is "a body of information that is made available to Allstate agents,

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[3] The complaint was dismissed in its entirety. We bring to this Court solely the propriety of the dismissal of the anti-trust claims.

including NOAs, in connection with their employment" (A14a).

Reasons for Granting the Writ

In *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), this Court stated that:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the marked for the tied items is restrained and the Sherman Act is violated.

Lest too much reliance be placed upon technical niceties, this Court stated further, at 21 n.34, that:

> Of course, the Sherman Act does not prohibit "tying"; it prohibits "contract[s] . . . in restraint of trade." Thus, in a sense the question whether this case involves "tying" is beside the point. *The legality of petitioner's conduct depends on its competitive consequences, not whether it can be labeled "tying."* (emphasis added.)

This Court should grant the writ and review the judgment and opinion of the Second Circuit because, in viewing petitioner's complaint as narrowly as it did, that court not only ignored those principles of *Jefferson Parish*, thus significantly shortening the reach of the anti-trust laws, but also put itself in conflict with other circuits' holdings on virtually identical issues.

POINT ONE

SECTION 1 OF THE SHERMAN ACT WAS VIOLATED WHEN SEARS REQUIRED THAT ALL ADVERTISING BY ALLSTATE AGENTS BE PLACED THROUGH AN AGENCY WHICH IT OWNED

The Second Circuit, in holding that "employment, standing alone, cannot constitute a tying product" (A13a), cited no other case so holding, gave no rationale for its pronouncement and ignored this Court's statements in *Jefferson Parish*.

If petitioners are to be viewed as mere employees and their relationship with Allstate as that of mere employment—as was the case *before* they became NOAs—the Second Circuit's ruling is in conflict with that of the Sixth Circuit which, in *Hand v. Central Transport Co.*, 779 F.2d 8 (6th Cir. 1985), held that employment as owner-operator of a truck was a tying product conditioned upon the financing of the purchase of that truck through the employer who owned it. See also *Bazal v. Belford Trucking Co.*, 442 F. Supp. 1089, 1094 (S.D. Fla. 1977) ("this court finds that a contract of employment can fall within the category of a "tying product").

The complaint alleged, however, that the NOA contract changed their relationship with Allstate and made them more like "independent contractors." That allegation was later confirmed by the Sixth Circuit which, in *Butts v. Commissioner of Internal Revenue*, 49 F.3d 713 (6th Cir. 1995) held that Allstate NOAs, although previously mere employees, had been transformed into independent contractors by virtue of that contract.

Viewed as independent contractors *vis-a-vis* Allstate, petitioners were in the same position as franchisees who are required by their franchisor to purchase incidental products either from the franchisor itself or from a source specified by

the franchisor. Where the required source is the franchisor itself, an illegal tie-in will be found. See, *e.g.*, *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983) (*per se* violation of Sherman Act for Mobil to condition renewal of dealers' leases of service stations upon dealers' agreement to purchase Mobil automotive products); *Esposito v. Mister Softee, Inc.*, 1980-1 CCH Trade Cas. ¶63,089 (E.D.N.Y. 1979) (specified distributor of goods incidental to sale of ice cream was indirectly owned by franchisor; tie-in held illegal *per se*). Similar requirements that the franchisee obtain incidental products or services solely from a provider chosen by the franchisor have escaped condemnation as illegal tie-ins by a showing that the franchisor had no financial interest in the specified source. See, *e.g.*: *Carl Sandburg Village Condominium Ass'n. v. First Condominium Development Co.*, 758 F.2d 203 (7th Cir. 1985) (purchase of condominium tied to compulsory maintenance contract with specified company); *Olmstead v. Amoco Oil Corp.*, 725 F.2d 627 (11th Cir. 1984) (gas station lease tied to compulsory purchase of car wash equipment from specific sources); *Crawford Transport Co. v. Chrysler Corp.*, 338 F.2d 934 (6th Cir. 1964) (dealers' purchase of cars tied to compulsory use of specified transportation carriers); *Nelligan v. Ford Motor Co.*, 262 F.2d 556 (4th Cir. 1959) (dealers' purchase of cars tied to compulsory use of specified advertising agency).

We submit that the contractual relationship between the parties in such cases (e.g., automobile manufacturer vis-a-vis dealer or oil company vis-a-vis service station dealer) is no different from the contractual relationship between Allstate and the petitioners. In *Blanton*, *supra*, for example, when Mobil coerced its dealers into buying its automotive products by threatening to refuse to renew their service station leases, a *per se* Sherman Act violation was found. Here, however, the Second Circuit erred in failing to appreciate that a similar violation occurred when Sears, through Allstate, coerced the NOAs into using its advertising agency by threatening, if they

failed to do so, to withdraw its promise to allow them to advertise in the Yellow Pages—a promise which was a material inducement for petitioners to become NOAs in the first place. This Court should correct that error.

As noted in *Jefferson Parish* at 12 and 21, n.34, the essential characteristics of a *per se* Sherman Act violation is the wrongdoer's "exploitation of its control over the tying product," thereby "forcing" the victim to make a purchase choice he would not otherwise have made, with anticompetitive effects. Here, those essential characteristics were alleged. An employer with power over its employees induced them to enter into a different relationship with it—that of independent contractor—using as a material inducement the right to advertise, as an employee usually may not, but as an independent contractor usually may. Exploiting its obvious power over the once-employees (now independent contractors), it forced the latter, if they wished to take advantage of the advertising right offered, to do so only through an entity controlled by it, thus profiting financially from those transactions in which it had induced the NOAs to engage.

POINT TWO

SECTION 1 OF THE SHERMAN ACT WAS VIOLATED WHEN SEARS, THROUGH ITS WHOLLY-OWNED ALLSTATE, REQUIRED ALLSTATE AGENTS TO ACCESS AN ESSENTIAL DATABASE SOLELY THROUGH SEARS-OWNED COMPUTERS

The Second Circuit, in holding that the database cannot be a tying product since it was "not generally available to persons willing to pay for it" (A14a), i.e., it was not "sold,"[4] improperly limited the reach of the Sherman Act.

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[4] To say, as did the Southern District (A21a), that the NOAs did not have to pay for access to the database or, as did the Second Circuit

It is settled law that a database may constitute an illegal tying product with respect to the sale of hardware capable of accessing it. See, e.g.: *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985); *Telerate Systems, Inc. v. Caro*, 689 F. Supp. 221, 236 (S.D.N.Y. 1988) (anti-trust claim dismissed because, unlike facts in *Digidyne* case, "Telerate does not condition access to its database on the leasing of terminals from it"). See also *American Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473 (D. Minn. 1991), *aff'd.*, 967 F.2d 1208 (8th Cir. 1992), where certain farm implement dealers complained of an illegal tying arrangement in that they were forced to purchase computer systems from a specified source or risk losing their dealerships and summary judgment was granted against them solely because they could not prove that they were *required* to buy those systems.

It is true, of course, that in most tying cases the tying product is in fact sold by the entity that has an interest in the sale of the tied product. But the theory behind the condemnation of tie-ins—that it is wrong for one to thus exploit its control over the tying product—does not require a sale. Indeed, the opinions below appear to be the very first to hold that the tying product must actually be sold or offered for sale.

The issue of whether an actual "sale" of the tying product is required was squarely presented to the court in *Lucas Industries, Inc. v. Kendiesel, Inc.*, 1995 WL 350050 (D.N.J., June 9, 1995). There, the court rejected a party's argument that the valuable literature which it provided to its distributors could not be a "tying" product because it was *given away*

(A14a), that the database was not paid for, is to ignore economic reality. The ostensibly dispositive distinction between paying for the database, on the one hand, and paying for the equipment needed to access the database, on the other, is a distinction so ephemeral as to escape petitioner's comprehension. It is the proverbial "distinction without a difference."

rather than sold. The court stated (95 WL 350050 at pp. 3-4) that:

> Lucas alleges that Kendiesel has failed to state a claim for an illegal tying arrangement because Kendiesel has failed to identify two separate products or services that were tied by Lucas. Specifically, Lucas argues that literature is not a separate product that is sold or in demand. Lucas does not sell its technical literature to anyone but provides the technical information at no cost to authorized service dealers.
>
> * * *
>
> Lucas' argument that literature is not a separate product because it is given away at no charge must fail in light of *Kodak*[5] and *Jefferson Parish*. . . .
>
> . . . Lucas is alleged to be exploiting the demand for the free tying product in order to force buyers into the purchase of the tied product. This is the essence of the claim under Section 1 of the Sherman Act.

We submit that whether a technical "sale" may be inferred from the allegations of the complaint is irrelevant. The point is whether Allstate, because of its control over the essential database, was able to force upon the NOAs computers which they "might have preferred to purchase elsewhere [than from Sears] on different terms" *Jefferson Parish*, *supra* at 12.

A case on all fours with this is *United Farmers Agents Ass'n. v. Farmers Insurance Exchange*, (W.D. Tex., Docket No. A-92-CA-373 (JN), April 8, 1992). There, the agents of Farmers Insurance Exchange ("Farmers") brought an antitrust action complaining that Farmers would allow them to access necessary information in its database "only if the agents

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[5] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

purchased computer equipment" from Farmers, which "unilaterally dictated the prices and conditions of the computer equipment" . . . , even though "access to the [database] system could be achieved by using computer equipment other than that available" from Farmers. The trial court denied Farmers' motion to dismiss, holding that the complaint stated a valid antitrust tying claim.[6]

Conclusion

The improperly-dismissed complaint, like the Sherman Act invoked by it, made no reference to a "tie-in" or to a "tying" or "tied" product. Nor did it use such catch phrases as "market power," "linear movement" or the like. It simply alleged that Sears had exercised its obvious power over the NOAs and forced them, at the cost of their livelihoods, to lease indefinitely a Sears-owned computer and, if they wished to increase their income by Yellow Pages advertising, to do so only through a Sears-owned entity. Such allegations clearly stated claims under the Sherman Act, as this Court viewed that Act in *Jefferson Parish*.

For the foregoing reasons, the petition should be granted and the judgment of the Second Circuit in this case should be reviewed.

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[6] The case was later dismissed when, after discovery, it was shown, *inter alia*, that the agents could obtain the information they needed by means other than electronically accessing the database, that they could use another agent's computer, if they so chose, and that electronic access to the database was not necessary to the agents' work. See *United Farmers Agents Ass'n v. Farmers Insurance Exchange*, 892 F. Supp. 890 (W.D. Tex. 1995). That is not this case.

Respectfully submitted,

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September 20, 1996

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 713—August Term, 1995

(Argued: December 20, 1995 Decided: June 25, 1996)

Docket No. 95-7424

EDWIN DE JESUS, individually and on behalf of all others similarly situated, CAROLYN PENZO, LES TOTANS, WILLIAM COOKE, CARY WELSH, LEONARD TOLAND, RANDY J. LANE, DEBORAH LYNNE DEBORDES, NIXON MCCUNE and RONALD G. REDDING,

Plaintiffs-Appellants,

—VS.—

SEARS, ROEBUCK & CO., INC.,

Defendant-Appellee.

Before:

KEARSE, MAHONEY, and PARKER,

Circuit Judges.

Appeal from a judgment rendered in the United States District Court for the Southern District of New York that: (1) dismissed plaintiffs-appellants' third amended complaint, which alleged antitrust and RICO violations by defendant-appellee Sears, Roebuck & Co., Inc. with respect to a "Neighborhood Office Agent" program conducted by Sears' then-subsidiary Allstate Insurance Co., for failure to state a claim upon which relief can be granted; (2) declined to exercise supplemental jurisdiction over plaintiffs-appellants' pendent state law claims; and (3) denied leave to amend.

Affirmed.

PATRICK M. WALL, New York, New York, *for Plaintiffs-Appellants*.

THEODORE N. MIRVIS, New York, New York (Paul K. Rowe, Meir Feder, Wachtell, Lipton, Rosen & Katz, New York, New York of counsel), *for Defendant-Appellee*.

MAHONEY, *Circuit Judge*:

Plaintiffs-appellants Edwin De Jesus, Carolyn Penzo, Les Totans, William Cooke, Cary Welsh, Leonard Toland, Randy J. Lane, Deborah Lynne Debordes, Nixon McCune, and Ronald G. Redding ("Plaintiffs") appeal from a judgment entered March 28, 1995 in the United States District Court for the Southern District of New York, Michael B. Mukasey, *Judge*, that: (1) dismissed

the federal claims stated in their third amended complaint (the "Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; (2) declined to exercise supplemental jurisdiction over their pendent state law claims; and (3) denied leave to amend the Complaint. The Complaint alleged that defendant-appellee Sears, Roebuck & Co., Inc. ("Sears") violated § 1 of the Sherman Act, as amended, 15 U.S.C. § 1,[1] § 3 of the Clayton Act, 15 U.S.C. § 14,[2] and a provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a)-(c).[3] The complaint also alleged pendent state law claims.[4]

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1 Section 1 provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

2 Section 14 provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4(a) of the Clayton Act, as amended, 15 U.S.C. § 15(a), authorizes treble damage actions by "any person who shall be injured in his business or property by reason of" a violation of, *inter alia*, 15 U.S.C. §§ 1 or 14.

3 Section 1962(a)-(c) provides in pertinent part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering

(*footnote 4 appears on next page*)

On appeal, Plaintiffs contend that the Complaint was improperly dismissed. We disagree and affirm the judgment of the district court.

Background

This suit arises out of a Neighborhood Office Agent ("NOA") program instituted by Allstate Insurance Company ("Allstate") in late 1984 or early 1985 through which Allstate offered its agents the opportunity to establish local neighborhood Allstate offices. According to Sears, this program enabled participating agents to choose their own office sites, select their own staff, decide upon the level of office expenses, and maintain operational control over their own offices. Allstate would reimburse each NOA for office expenses up to

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activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1964(c) authorizes treble damage actions by "[a]ny person injured in his business or property by reason of a violation of section 1962."

4 Plaintiffs also brought a claim under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, which was withdrawn prior to this appeal.

a total equalling a percentage of premiums earned by the agent, with the formula weighted to new business production. Through this NOA program, Allstate hoped to increase business and profits, while providing its agents with entrepreneurial opportunities and greater flexibility and control over their own offices. *See generally Deus v. Allstate Ins. Co.*, 15 F.3d 506, 511-12 (5th Cir.) (describing NOA program), *cert. denied*, 115 S. Ct. 573 (1994).

Plaintiffs are residents of various states who worked as NOAs for Allstate, a subsidiary of The Allstate Corporation. They sue both individually and as representatives of the class of NOAs allegedly injured by Sears. Sears is a New York corporation and has its principal place of business in Illinois. It conducts business in all fifty states, and at all relevant times was the parent corporation of The Allstate Corporation.[5]

Plaintiffs allege that Sears maintained Allstate as a "criminal enterprise" that "coerce[d] and/or fraudulently induce[d] its current agents and . . . fraudulently induce[d] others who wished to become agents . . . to accept the status of [NOAs]." This was allegedly accomplished, *inter alia*, by (1) knowingly making false statements that Allstate would reimburse NOAs for virtually all out-of-pocket expenses associated with operating an office, and assuring potential NOAs that they would earn substantially more income as NOAs; (2) threatening Allstate agents with termination if they chose not to enter the NOA program; and (3) falsely assuring prospective NOAs that Allstate's marketing resources

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[5] On June 9, 1993, Sears completed a public offering of 19.9% of its ownership interest in The Allstate Corporation; Sears' remaining ownership interest in that corporation was spun off to Sears' shareholders on June 30, 1995.

would be made available to assist them in numerous ways, including selecting sites, negotiating leases, choosing equipment, staffing offices, and processing claims. plaintiffs-appellants claim that Sears' purpose for designing this fraudulent scheme was three-fold:

> (a) to cause the NOAs to shoulder the lion's share of expenses, thus removing from Allstate the cost of field operations; (b) to ensure the failure of these NOAs after they had had time to develop a substantial book of business, so that Allstate could claim the benefit of the NOA's efforts by obtaining the "book of business" developed by the NOA at his or her own expense and risk; and (c) to put the NOAs in such a state of financial insecurity as to coerce them into changing their status from that of NOA to that of Neighborhood Exclusive Agent ("NEA"), thus causing the NOA to abandon his or her pension and welfare benefits—benefits to which a[n] NEA was not entitled.

In their RICO Case Statement, Plaintiffs assert that Sears achieved these objectives through the aid of Allstate's upper level management officials and local sales managers. However, no specific Sears officials or employees are alleged to have personally participated in the scheme. Instead, Plaintiffs describe Sears' relationship to the alleged RICO enterprise, Allstate, as follows:

> Sears operated and managed the enterprise through corporate control. As the 100%, then 80%, and controlling shareholder of Allstate, Sears has historically and is currently empowered to appoint Allstate's management, including its Board of Directors and its senior officers. In this fashion,

> Sears determines the business objectives and goals of Allstate, and designates those persons who manage and operate Allstate in accordance with those objectives and goals.

In sum, Plaintiffs claim that Sears achieved its fraudulent objectives because "through its control over [The Allstate Corporation, Sears was] able to control Allstate."

Plaintiffs also assert two antitrust claims pursuant to 15 U.S.C. §§ 1 and 14. Their complaint alleges that Sears, "through Allstate," engaged in unlawful "tying" arrangements by: (1) requiring NOAs who wanted to advertise individually in the Yellow Pages to arrange for such advertising exclusively through Woodward Direct—an agency allegedly owned or controlled by Sears; and (2) requiring each NOA to lease a Sears computer at excessive cost (compared to the cost at which other equally effective computers were available) in order to access the Allstate database.

Sears moved to dismiss the Complaint, contending that Plaintiffs had failed to state a federal claim, and that the district court should not exercise supplemental jurisdiction over their pendent state law claims. In an opinion and order dated March 20, 1995, the district court granted Sears' motion. The court concluded that Plaintiffs' RICO claims failed to allege fraud with the degree of particularity required by Rule 9(b) of the Federal Rules of Civil Procedure, and especially that "both the complaint and RICO Case Statement fail to allege fraud with particularity against Sears, the named defendant in this case." The court also determined that no unlawful "tying" arrangement was alleged as to the required use either of Woodward Direct to advertise in the Yellow

Pages, or of a Sears computer to access the Allstate database. In view of the dismissal of Plaintiffs' federal claims, the district court declined to exercise supplemental jurisdiction over their state law claims. The court also denied Plaintiffs leave to amend their complaint in view of their prior opportunities to do so.

This appeal followed.

Discussion

We review a Rule 12(b)(6) dismissal *de novo*. *Branham v. Meachum*, 77 F.3d 626, 628 (2d Cir. 1996); *Dorking Genetics v. United States*, 76 F.3d 1261, 1269 (2d Cir. 1996).[6] On appeal, Plaintiffs argue that: (1) the Complaint alleged valid RICO claims; (2) the Complaint adequately alleged unlawful "tying" arrangements under the Sherman and Clayton Acts; and (3) in any event, the district court should have granted Plaintiffs an opportunity to replead their RICO claims with sufficient particularity. We address these contentions in turn.

A. *The RICO Claims.*

"A motion to dismiss is designed to test the legal sufficiency of the complaint, and thus does not require the Court to examine the evidence at issue." *Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7, 9 (D. Me. 1995) (citing *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985)). Accordingly, we must accept as true all well-

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[6] Because the district court did not reach the issue of class certification, our decision cannot properly bind the alleged class. *Pharo v. Smith*, 621 F.2d 656, 664 (5th Cir.), *modified on other grounds*, 625 F.2d 1226 (5th Cir. 1980) (per curiam). "We therefore treat this case as one brought by the named plaintiffs individually, not as members of a class." *Pharo*, 621 F.2d at 664 (collecting cases).

pleaded factual allegations in the Complaint and view them in the light most favorable to Plaintiffs. *Papasan v. Allain*, 478 U.S. 265, 283 (1986). The complaint is deemed to include any document annexed to it as an exhibit. *See* Fed. R. Civ. P. 10(c). Even viewing all of Plaintiffs' RICO allegations in this favorable light, however, we find no basis upon which to conclude that Sears is a proper defendant for Plaintiffs' RICO claims.

The Complaint and RICO Case Statement name Sears as a defendant solely because of its corporate relationship to Allstate. As noted above, Plaintiffs claim that "Sears operated and managed the [RICO] enterprise through corporate control[,]" and that "[i]n this fashion, Sears determine[d] the business objectives and goals of Allstate, and designate[d] those persons who manage[d] and operate[d] Allstate in accordance with [the fraudulent RICO] objectives and goals." There is no allegation that Sears employees acted independently to further this alleged RICO scheme.

"In some instances, the corporate relationship between a parent and its subsidiary [is] sufficiently close . . . to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other. As a general matter, however, a corporate relationship alone is not sufficient to bind a [parent corporation for the actions of its subsidiary]." *Thomson-CSF, S.A. v. American Arbitration Ass'n.*, 64 F.3d 773, 777 (2d Cir. 1995). Indeed, "[o]wnership by a parent of all its subsidiary's stock has been held an insufficient reason in and of itself to disregard distinct corporate entities. Actual domination, rather than the opportunity to exercise control, must be shown." *Williams v. McAllister Bros. Inc.*, 534 F.2d 19, 21 (2d Cir. 1976) (citations omitted); *cf. Volkswagenwerk Aktiengesellschaft v. Beech*

Aircraft Corp., 751 F.2d 117, 120 (2d Cir. 1984) (in reviewing grant of Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, stating that "[t]he officers of any corporation that owns the stock of another necessarily exercise a considerable degree of control over the subsidiary corporation and the discharge of that supervision alone is not enough to subject the parent to [personal] jurisdiction").

To overcome "the 'presumption of separateness' afforded to related corporations," Plaintiffs must come forward with "the showing of actual domination required to pierce the corporate veil." *Williams*, 534 F.2d at 22 (quoting *American Renaissance Lines, Inc. v. Saxis S.S. Co.*, 502 F.2d 674, 677 (2d Cir. 1974)). Plaintiffs assert that the fraudulent actions taken by Allstate employees were "caused by, known to and ratified by Sears." However, the pleadings are devoid of *any* specific facts or circumstances supporting this assertion. "A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995); *see also Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (" '[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.' " (quoting *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993))); *Grossman v. Citrus Assocs. of New York Cotton Exch., Inc.*, 706 F. Supp. 221, 229 (S.D.N.Y. 1989) (conclusory allegations of participation in a fraudulent scheme or bad faith will not withstand a Rule 12(b)(6) motion to dismiss). The Complaint does not allege facts from which it may be inferred that Sears dominated Allstate's administration of the NOA program, or that Sears employees them-

selves acted to defraud Plaintiffs. We accordingly conclude that Sears is not an appropriate defendant with respect to Plaintiffs' RICO claims, and that these claims were properly dismissed.

B. *The Antitrust Claims.*

As previously described, the Complaint alleges two unlawful "tying" arrangements in violation of 15 U.S.C. §§ 1 and 14, *supra* notes 1 and 2. "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchase[ ] a different (or tied) product.' " *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2d Cir. 1980) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)). "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984); *see also Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 200 (3d Cir.), *cert. denied*, 115 S. Ct. 684 (1994).

As to the detailed requirements to state a tying claim—

> [W]e have required allegations and proof of five specific elements before finding a tie illegal: first, a tying and a tied product; second, evidence of actual coercion by the seller that forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, the

involvement of a "not insubstantial" amount of interstate commerce in the "tied" market.

Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp., 880 F.2d 1514, 1516-17 (2d Cir. 1989) (citing *Yentsch*, 630 F.2d at 56-57). These elements are common to claims asserted under either the Sherman or Clayton Acts. *See Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1189 n.2 (9th Cir. 1984) ("[T]he elements for establishing a [tying] violation under each provision are virtually the same."), *cert. denied*, 469 U.S. 1213 (1985); *Detroit City Dairy, Inc. v. Kowalski Sausage Co.*, 393 F. Supp. 453, 458 (E.D. Mich. 1975) ("With respect to [the tying] definition, there is no need to differentiate between the Sherman and Clayton Acts. The definition of a tying arrangement is the same for both.").

Plaintiffs' first tying claim charges that NOAs were forced, as a condition of employment, to advertise through an entity allegedly controlled by Sears.[7] Thus, employment as an NOA is the alleged tying product, and advertising in the Yellow Pages through a Sears-controlled company is the alleged tied product. The district court concluded that employment, standing alone, cannot constitute a tying product within the meaning of the antitrust laws. We agree.

Plaintiffs invoke *Bazal v. Belford Trucking Co.*, 442 F. Supp. 1089, 1093-96 (S.D. Fla. 1977), to argue that an employment contract can be a tying product. That case involved an agreement to rent a truck from one affiliated defendant, and to use that truck in the employ of a sec-

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[7] Because both tying claims allege a direct benefit either to Sears or to an entity (other than Allstate) owned or controlled by Sears, we assume for purposes of this appeal that Sears is a proper defendant with respect to Plaintiffs' antitrust claims, as distinguished from their RICO claims.

ond affiliated defendant. The district court ruled that "a contract of employment can fall within the category of a 'tying product.' " *Id.* at 1094. In doing so, it relied upon cases in which franchise contracts and credit, although "somewhat less tangible than a conventional product or service," *id.*, had been treated as a qualifying "product" for purposes of tying analysis. *Bazal* specifically pointed to a Second Circuit precedent, *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965), in support of its ruling. *See* 442 F. Supp. at 1094.

Susser, however, involved a sale of both the tying product and the tied product to the party complaining of an antitrust violation. This pattern accords with the "fundamental principle of antitrust law that an illegal tying arrangement requires that at least two products and/or services be purchased by the same individual; that is, there must be lineal movement between the products." *Waldo v. North Am. Van Lines, Inc.*, 669 F. Supp. 722, 731 (W.D. Pa. 1987) (collecting cases). It is simply implausible to regard Plaintiffs' employment, a service which they provide to Allstate and for which they are paid by Allstate, as something that Allstate or Sears is selling to Plaintiffs. Thus, whatever other legal theories might be invoked regarding this situation,[8] this tying claim fails at the threshold.

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[8] The complaint alleges that the conduct charged in this case "constituted wrongful misrepresentation, fraud, equitable fraud, fraudulent inducement to cause others to enter into contracts, coercive tactics to compel others to enter into contracts, failure to disclose information, the intentional or reckless or negligent giving of false tax instructions followed by the recipient to his or her detriment, breach of fiduciary duty, *prima facie* torts and other wrongful conduct under the applicable laws of each of the states in which the NOAs reside and in which Sears does business, including state RICO and anti-trust statutes."

Plaintiffs' other tying claim concerns the alleged requirement to lease a Sears computer for access to the Allstate database. This claim assumes that access to the Allstate database, or the database itself, can be deemed a tying or tied "product." We reject the assumption. The database is not generally available to persons willing to pay for it. Rather it is a body of information that is made available to Allstate agents, including NOAs, in connection with their employment. *See United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch.*, 892 F. Supp. 890, 902 (W.D. Tex. 1995) ("[E]lectronic access to the information contained in [a database maintained by an insurance company for its agents] is not a 'product' capable of tying IBM computers . . . ."). Again, this tying claim fails at the threshold.

C. *Denial of Leave to Amend.*

After dismissing the Complaint, the district court refused to grant Plaintiffs leave to file a further amended complaint. We review this decision for an abuse of discretion. *See San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 815 (2d Cir. 1996); *Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987); *Luce v. Edelstein*, 802 F.2d 49, 57 (2d Cir. 1986); *Armstrong v. McAlpin*, 699 F.2d 79, 93-94 (2d Cir. 1983). While we have found it an abuse of discretion to dismiss allegations of fraud without granting a party leave to file an initial amendment of its complaint to comply with Rule 9(b) of the Federal Rules of Civil Procedure, *see Devaney*, 813 F.2d at 569; *Luce*, 802 F.2d at 56-57, we have also upheld decisions to dismiss a complaint without leave to replead when a party has been given ample prior opportunity to allege a claim, *see Armstrong*, 699 F.2d at 93-94 ("Because the

complaint whose allegations were being considered by the district court was plaintiffs' second amended complaint, the district court did not abuse its discretion in refusing to give plaintiffs a fourth attempt to plead."); *see also Luce*, 802 F.2d at 56 ("In cases where such leave has not been granted, plaintiffs have usually already had one opportunity to plead fraud with greater specificity . . . ."). Plaintiffs were accorded four opportunities to plead their claims in this case, and the deficiencies in their federal claims are fundamental. *See San Leandro*, 75 F.3d at 815 (leave to replead not required when proposed amendment would not cure complaint's deficiency). The district court did not abuse its discretion by refusing them a fifth opportunity. Nor, having dismissed Plaintiffs' federal claims, did the district court abuse its discretion by declining to exercise supplemental jurisdiction over the myriad state law claims, *see supra* note 8, alleged by Plaintiffs. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Conclusion

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 2605 (MBM)
March 22, 1995

Edwin De Jesus, *et al.*,

Plaintiffs,

—v.—

SEARS, ROEBUCK AND CO.,

Defendant.

Patrick M. Wall, New York City, Daryl J. Hudson, III, Washington, DC, Adrian F. Lanser, III, Lanser, Levinson & Paul, P.C., Centerville, GA, for plaintiffs.

Theodore N. Mirvis, Paul K. Rowe, Meir Feder, Wachtell, Lipton, Rosen & Katz, New York City, for defendant.

OPINION AND ORDER

MUKASEY, District Judge

Plaintiffs Edwin De Jesus, Carolyn Penzo, Richard C. Larkin, Albert G. Napolitano, William M. Cooke, Leonard Foland, Randy Lane, and 10,000 other persons who allegedly worked as Neighborhood Office Agents ("NOAs") for Allstate Insurance Company, sue Sears, Roebuck & Company, Inc., the sole owner of Allstate, for Allstate's alleged Violation of the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 13-15, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq., and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq. Plaintiffs allege also various state law claims. Defendant moves to dismiss the federal claims, pursuant to Fed.R.Civ.P. 12(b) and 9(b), and to dismiss the state claims for lack of jurisdiction. For the reasons set forth below, defendant's motion is granted, and the plaintiffs' third amended complaint is dismissed, without leave to replead.

I.

Plaintiffs, residents of various states, allege that in 1984, Sears "secretly began a fraudulent scheme" to cause individual Allstate agents to "shoulder the lion's share" of office costs, "ensure the failure" of these agents once they had developed a "book of business" so that Allstate could take over their business without paying for the initial operating costs, and place the agents "in such a state of financial insecurity" that they would agree to assume new positions at Allstate even though this meant abandoning their pension and welfare benefits. (Complt. ¶¶ 7, 9) As part of the scheme, Sears allegedly conspired to create a new entity, TAC, in 1992, which it allegedly capitalized with all of Allstate's insurance business, and part of Sears' short-term corporate debt. (Complt. ¶ 23) Sears allegedly did this to mask liabili-

ties totalling hundreds of millions of dollars. (Id.) The alleged scheme came to life as the NOA program, which was part of a new plan called Foundation for Growth. Previously, Allstate directly paid office expenses; under the new plan, Allstate provided each NOA with a limited office expense allowance for rent and office maintenance based on a percentage of the premiums earned by each NOA. (RICO Case Statement, Ex. B)

Plaintiffs allege that Allstate coerced or fraudulently induced them to enter the NOA program by threatening loss of employment, discriminatroy treatment, relocation to undesirable offices, reduction in secretarial assistance and telecommunication equipment, and competition from other Allstate agents, and by deceptive tactics such as making false promises that Allstate would underwrite the cost of running an office and misinforming them about potential earnings and Allstate's marketing assistance. (Complt. ¶ 13) Once the Allstate agents became NOAs, plaintiffs allege that Sears, through Allstate, required those NOAs who wished to advertise in the "Yellow Pages" to do so through Woodward Direct, an entity allegedly controlled by Sears. (Id. at ¶ 20) Sears, through Allstate, allegedly required also that each NOA lease a computer from Sears in order to access Allstate's data base, and instructed the NOAs that they were "employees" rather than "independent contractors" for income tax purposes. Plaintiffs assert, however, that unlike employees, they had to pay for rent, utilities, liability insurance, payroll, secretarial assistance, and other expenses normally paid by independent contractors. (Id. at ¶ 21)

Plaintiffs claim that Allstate paid only a "small portion" of NOAs' expenses, and that rather than severing their relationship with Allstate entirely, thereby relinquishing their right to accumulated benefits, they instead paid their own expenses in anticipation of future profits. When the expected profits did not materialize, numerous NOAs allegedly "lost substantial portions of their life savings in the hopeless task of trying to 'save' Allstate's NOA stores." (Complt. ¶ 17) By the early

1990s, at least one plaintiff had declared bankruptcy, others were making significantly less money than they had expected, and at least one gave up his pension benefits to become an Allstate Neighborhood Exclusive Agent. (Id. at ¶ 13)

II.

Plaintiffs' first two claims allege that Sears violated the antitrust laws, 15 U.S.C. §§ 1, 13-15, by engaging in an illegal "tying" arrangement, based on its alleged requirement that NOAs purchase their Yellow Page advertising through a service allegedly controlled by Sears (Complt. ¶¶ 24-28), and that they lease a Sears computer at a cost above the market rate. (Id. at ¶¶ 29-33) Because plaintiffs' complaint fails to allege an unlawful tying arrangement, their antitrust claims are dismissed.

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." Yentsch v. Texaco, Inc., 630 F.2d 46, 56 (2d Cir.1980) (quotation omitted). The essence of an invalid tying arrangement "lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984). This Circuit requires allegations and proof of five elements before finding a tie illegal; 1) a tying and a tied product; 2) evidence of actual coercion by the seller that forced the buyer to accept the tied product; 3) sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; 4) anticompetitive effects in the tied market; and 5) involvement of a "not insubstantial" amount of interstate commerce in the tied product market. Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp., 880 F.2d 1514, 1516-17 (2d Cir.1989).

Reading the complaint in the light most favorable to plaintiffs, there are two alleged tying arrangements; first, that

some plaintiffs were forced, as a condition of employment, to advertise through an entity allegedly controlled by Sears; second, that in order for plaintiffs to access the Allstate data base, they had to lease, at above market cost, a Sears computer. Neither allegation states an illegal tying arrangement. In the first arrangement, plaintiffs fail to establish a proper tying and tied product. The tying product appears to be employment as an NOA, and the tied product is advertising in the Yellow Pages through Woodward Direct. There is no precedent in this Circuit suggesting that employment alone is a tying product. The one case supporting this proposition, Bazal v. Belford Trucking Co., Inc., 442 F.Supp. 1089, 1093-1096 (S.D.Fla.1977), has not been followed in any circuit. Bazal is also distinguishable from the facts of this case because in Bazal, plaintiff established that defendant had the requisite market power, id. at 1096-97, while here plaintiffs failed to allege Allstate's market power, by stating its market share, its advantage over competitors, or its sale of a unique product. See Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788-89 (2d Cir.1992) (no illegal tying arrangement absent evidence on market power or uniqueness); Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 192 (2d Cir.1992) (plaintiffs must "allege facts sufficient to support an inference that [defendant] had appreciable economic power in the tying product") (quotation omitted); 305 East 24th Owners Corp. v. Parman Co., 714 F.Supp. 1296, 1305-06 (S.D.N.Y.1989) (to establish market power, plaintiffs must show that the "seller's share of the market is high, or that the seller has some advantage not shared by his competitors in the market for the tying product. . . . [or] the unique character of the tying product") (quotations omitted), aff'd, 994 F.2d 94 (2d Cir.1993). Even assuming, arguendo, that employment at Allstate could be a tying product, plaintiffs' claim involving the alleged illegal tying arrangement with Woodward Direct must be dismissed for failing to allege either Allstate's market power or the uniqueness of its product. See 305 East 24th

Owners Corp., 714 F.Supp. at 1305 ("economic power in the market for the tying product is the most crucial element").

The second alleged tying arrangement involved Allstate's requirement that plaintiffs lease a Sears computer in order to access the Allstate data base. For this alleged tying arrangement, the computer is the tied product, and the data base is the tying product. A basic requirement of an illegal tying arrangement is that the defendant actually sell both the tying and tied products. Trans Sport, Inc., 964 F.2d at 192 (coercion can by shown where manufacturer goes beyond persuasion and conditions its retailer's purchase of one product on the purchase of another product") (quotation omitted); Gonzalez, 880 F.2d at 1516 (tying arrangement is agreement by party to "sell one product but only on the condition that the buyer also purchases a different . . . product") (quotation omitted). Because there is no claim that plaintiffs were required to pay for the Allstate data base, their allegation of an illegal tying arrangement must fail. The principal case plaintiffs rely on, Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1338-39 (9th Cir.1984), cert. denied, 473 U.S. 908 (1985), is not to the contrary. In Digidyne, the Court recognized that "the purchase of one (tying product) being conditioned on purchase of the other (tied product)" is a prerequisite for an illegal tying arrangement, and the plaintiff established that both the tying and tied product were purchased. Because plaintiffs have failed to allege this threshold requirement, their second alleged illegal tying arrangement also does not state a valid claim.

III.

In claims four through six, plaintiffs allege that Sears violated RICO, 18 U.S.C. §§ 1962(a)-(c) by directing Allstate to coerce and/or fraudulently induce Allstate employees to become NOAs. The alleged fraud perpetrated by Allstate employees (Complt. ¶ 13; RICO Case Statement ¶ 3), which was purportedly "caused by known to and ratified by Sears"

(RICO Case Statement ¶ 2), included alleged false statements about office expenses, expected earned income, working hours, and potential for business growth. (Complt. ¶ 13; RICO Case Statement ¶ 2) Plaintiffs allege further that Sears, through Allstate, caused two documents to be mailed to high-ranking Sears and Allstate officials; "Foundation for Growth," plan setting forth the goals of the NOA program; and "The Allstate Agent Distribution System; Booz-Allen-Hamilton Study," a 1984 report allegedly analyzing the possible effects of implementing the NOA program. (RICO Case Statement ¶ 5) Plaintiffs assert that beginning in 1986, Sears, through Allstate, mailed or transmitted through facsimile thousands of copies of a document soliciting potential NOAs, and that NOAs' applications and contracts were sent also through the mails. (Id.) These various mailings and facsimile transmissions allegedly violated the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and comprised the predicate acts required under RICO.

Because plaintiffs' RICO claims are based on predicate acts of mail and wire fraud, their pleadings must comply with Fed.R.Civ.P. 9(b). Giuliano v. Everything Yogurt, Inc., 819 F.Supp. 240, 244 (E.D.N.Y.1993) (citing Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 49-50 (2d Cir.1987), cert. denied, 484 U.S. 1005 (1988)). Fed.R.Civ.P. 9(b) provides: "In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." To specify fraud with particularity, plaintiffs must allege specifically the circumstances of the fraud, including the content of any alleged misrepresentation, the date and place of the misrepresentation, and the identity of the speaker or writer. Cohen v. Koenig, 25 F.3d 1168, 1173 (2d Cir.1994). Plaintiffs must provide also factual allegations to support a "strong inference" that defendants had fraudulent intent. Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir.1990). Strong inference can be established either by identifying circumstances showing conscious behavior by defen-

dants, Cosmas v. Hassett, 886 F.2d 8, 13 (2d Cir.1989), or by presenting facts which show a motive for committing fraud and an opportunity for doing so. Turkish v. Kasenetz, 27 F.3d 23, 28 (2d Cir.1994).

Plaintiffs have failed to satisfy the Rule 9(b) requirements. First, Allstate employees' alleged false statements concerning NOAs' potential future income, working hours, and business growth are, as Judge Friendly put it, examples of "alleging fraud by hindsight." Denny v. Barbert, 576 F.2d 465, 470 (2d Cir.1978). Mere "puffery" or opinions as to future events, or failure to fulfill promises to perform future acts, absent "an intent not to perform at the time the promise was made," are insufficient grounds for alleging fraud. Cohen v. Koenig, 25 F.3d at 1172; Kubin v. Miller, 801 F.Supp. 1101, 1116 (S.D.N.Y.1992). The only potential factual underpinning to the panoply of allegations against Allstate is that various Allstate agents "knew" that their statements to plaintiffs were false when made. Such conclusory allegations are insufficient under Rule 9(b) to convert what may possibly be contract claims into fraud claims. O'Brien v. National Property Analysts Partners, 936 F.2d 674, 677 (2d Cir.1991); Drexel Burnham Lambert, Inc. v. Saxony Heights Realty Assocs., 777 F.Supp. 228, 235 (S.D.N.Y.1991); Dickinson v. Kaplan, 763 F.Supp. 694, 701 (E.D.N.Y.1990), aff'd, 963 F.2d 1522 (2d Cir.1992).

Second, both the complaint and RICO Case Statement fail to allege fraud with particularity against Sears, the named defendant in this case. Plaintiffs' papers make clear that Allstate, and not Sears, actually sent the alleged fraudulent material through the mails or over the wires. (RICO Case Statement ¶ 5) The alleged fraudulent document soliciting potential NOAs also does not state what plaintiffs assert, namely that Sears, through Allstate, allegedly promised to pay for office expenses. In fact, Allstate promised only that an office expense allowance would be calculated according to a formula using premium percentages. (Id.; Ex. B) Plaintiffs assert that the Booz-Allen-Hamilton study demonstrates that

Sears "anticipated that agent revenue would decline" at the time NOAs were offered "an expense plan premised on expanding market share" (Pl.Mem. at 18), but that claim does not comport with what the study actually states. The several pages of the study attached as an exhibit to the RICO Case Statement show that NOAs "will need to sell more to achieve comparable income" and that the office expense allowance program "provides strong new business incentive." (RICO Case Statement, Ex. B) Thus, there is nothing contradictory about what the study seems to reveal, and what Sears, through Allstate, allegedly reported to potential NOAs. In situations where an exhibit is attached to a party's pleadings, the document itself, and not the party's interpretation of that document, prevails. See Artco, Inc. v. Kidde, Inc., No. 88 Civ. 5734, 1989 WL 140284, at *3 (S.D.N.Y. Nov. 15, 1989) ("The exhibits, not the pleadings, control"). Because the document does not say what plaintiffs claim it says, there is nothing to suggest that either Allstate or Sears had a duty to disclose any of the possible implications of the Booz-Allen-Hamilton Study (RICO Case Statement ¶ 5, Ex. B), which was apparently sent by Allstate officials to other unnamed Allstate and Sears officials. See Adler v. Berg Harmon Assocs., 816 F.Supp. 919, 924 (S.D.N.Y.1993) (particularity requirement of Rule 9(b) applies to allegations of fraudulent omissions). Plaintiffs therefore must rely on a theory of vicarious liability to satisfy the requirements of Rule 9(b). However, courts in this Circuit have recognized such theories for civil RICO actions only in limited circumstances, such as where "the corporation may fairly be said to be a central figure (or aggressor) in the alleged scheme." Larco, Inc. v. Chase Manhattan Bank, N.A., 866 F.Supp. 132, 140 (S.D.N.Y.1994) (quoting Gruber v. Prudential-Bache Securities, Inc., 679 F.Supp. 165, 181 (D.Conn.1987); Tribune Co. v. Purcigliotti, 869 F.Supp. 1976, 1089 n. 8 (S.D.N.Y.1994) ("the weight of authority in this district and other circuits is against the imposition of vicarious liability as a basis for civil liability under RICO) (quotation omitted).

Having failed to demonstrate any evidence suggesting that Sears, and not Allstate, was the central figure behind the alleged fraudulent acts, plaintiffs may pass the Rule 9(b) threshold only by demonstrating that Sears had a motive for committing fraud, and an opportunity for doing so. Plaintiffs argue that the essence of Sears' alleged fraudulent scheme was to "ensure the failure" of the NOA program in order to take over the agents' "book of business." (Complt. ¶ 9) For Sears to have created a large national program, expended significant sums of money developing and implementing it, for the main purpose of destroying it defies "informed economic self-interest" and therefore fails to allege sufficient motive. Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1130 (2d Cir. 1994); Atlantic Gypsum Co. v. Lloyds Int'l Corp., 753 F.Supp. 505, 514 (S.D.N.Y.1990).

Because plaintiffs have failed to plead fraud with particularity as to Sears, the named defendant, as required by Fed.R.Civ.P. 9(b), their RICO claims must be dismissed. With the dismissal of all of the federal claims, there is no good reason to assert jurisdiction over plaintiffs' pendent state claims. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Finally, in view of the two prior opportunities plaintiffs have had to amend their complaint, I see no reason to invite a fourth attempt to plead a cognizable claim. The compliant is dismissed.

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[1] Plaintiffs have withdrawn their ERISA claim and consented to its dismissal. (Pl.Mem.at 11)